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VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Written Ex Parte Communication***

GN Docket No. 18-122, *Expanding Flexible Use of the 3.7 GHz to 4.2 GHz Band*

Dear Ms. Dortch:

In its recent *ex parte* letter, the C-Band Alliance ("CBA") attempts to defend the deep legal flaws of its proposal to engage in private transactions to assign spectrum rights in the 3.7-4.2 GHz band ("C-band") – rights it does not hold – to the parties of its choosing.[1/] But the CBA cannot disguise that its proposal is inconsistent with the Communications Act (the "Act") and FCC precedent. Instead, it remains clear that the CBA's proposal is a self-serving attempt to strip the Commission of its statutory obligations – safeguards that were in put place by Congress to ensure that the public interest is served – and direct all financial gains to entities who not only do not have the terrestrial rights they propose to sell, but also did not initially pay for the spectrum.

The CBA Misconstrues, Misapplies, and Ignores Congressional Intent

The CBA argues that Section 309(j)(1) of the Act does not mandate competitive bidding, but instead limits its use to instances where the Commission *accepts* mutually exclusive applications.[2/] The CBA further argues that Section 309(j)(6)(E) of the Act directs the Commission to consider means to *avoid* accepting mutually exclusive applications.[3/] The CBA is wrong about how both of these provisions operate.

Section 309(j)(1) While the trigger for the requirement that the Commission use competitive bidding is the *acceptance* of mutually exclusive applications, the Commission is not free to evade Congress' clear direction by ignoring the fact that there would be mutually exclusive applications for the C-band and simply declining to accept them. The Commission routinely

1/ *See* Letter from Jennifer D. Hindin, Wiley Rein LLP, Counsel for the C-Band Alliance, to Ms. Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Feb. 6, 2019) ("CBA Letter").

2/ *See id.* at 2.

3/ *See id*.

adopts rules covering the submission of mutually exclusive applications and schedules auctions for repurposed spectrum even before any competing applications are received.

For instance, in the *Spectrum Frontiers* proceeding, the Commission acknowledged that its statutory mandate in Section 309(j) "applies to the mmW bands" and stated that "[c]onsistent with the Commission's policy that competitive bidding places licenses in the hands of those that value the spectrum most highly, we believe that it would be in the public interest to adopt a licensing scheme for the Upper Microwave Flexible Use Service which allows the filing of mutually exclusive applications that, if accepted, would be resolved through competitive bidding."[4/] And the Commission made the same determination in its 3.5 GHz band proceeding for Priority Access Licenses ("PALs").[5/] Those decisions demonstrate that the Commission's expectation that multiple parties will compete for the spectrum at issue necessitates the acceptance of mutually exclusive applications. Indeed, had the Commission not expected to receive mutually exclusive applications for licenses covering those spectrum bands, it would not have adopted a licensing scheme that allowed for the acceptance of mutually exclusive applications for those bands.

A C-band incentive auction would likewise warrant the acceptance of mutually exclusive applications that trigger competitive bidding. As evidenced just by the record to date, the Commission can expect widespread interest and participation in an incentive auction for C-band spectrum,[6/] creating the mutual exclusivity that requires the Commission to conduct an auction for the spectrum.

4/ *See Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, Notice of Proposed Rulemaking, 30 FCC Rcd 11878, ¶¶ 244-45 (2015); *see also Use of Spectrum Bands Above 24 GHz for Mobile Radio Services, et al*., Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 8014, ¶ 244 (2016) ("*2016 Spectrum Frontiers Order*") (adopting its proposal to accept mutually exclusive applications and recognizing that "it would be in the public interest and consistent with [the FCC's] statutory mandate to adopt a licensing scheme that allows the filing of mutually exclusive applications for licenses in the 28, 37, and 39 GHz bands which, if accepted, would be resolved through competitive bidding").

5/ *See Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, Further Notice of Proposed Rulemaking, 29 FCC Rcd 4273, ¶ 54 (2014) ("Consistent with the Commission's policy that competitive bidding places licenses in the hands of those that value the spectrum most highly, we believe that it would be in the public interest to adopt a licensing scheme for PALs which allows the filing of mutually exclusive applications that, if accepted, would be resolved through competitive bidding."); *Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, Report and Order and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd 3959, ¶ 122 (2015) (adopting a licensing scheme that allows the filing of mutually exclusive applications, triggering the use of competitive bidding, for PALs).

6/ *See, e.g.*, Comments of AT&T Services, Inc., GN Docket No. 18-122, at 5-7 (filed Oct. 29, 2018) (explaining that mid-band spectrum "is known to be critical for the development of robust, wide area 5G systems" and asserting that configuring the C-band for optimal utility "will depend upon a reallocation substantial enough to provide multiple licensees with the opportunity to obtain significant spectrum depth in the band"); Comments of Verizon, GN Docket No. 18-122, at i, 3 (filed Oct. 29, 2018) (pointing out

Even if the Commission is uncertain regarding whether it expects robust participation for a particular spectrum band, the answer is not to avoid accepting mutually exclusive applications. To the contrary, the Commission accounts for the fact that it may not receive mutually exclusive applications for some licenses by removing from auction those licenses where there is no mutual exclusivity.[7/] The steps the Commission is required to take are clear: accept potentially mutually exclusive applications, contemplating the use of competitive bidding, and then remove from auction any licenses for which there is limited or no interest.

Section 309(j)(6)(E) The CBA is also incorrect that the Commission has broad authority under Section 309(j)(6)(E) to use alternative mechanisms, such as negotiations, to avoid mutual exclusivity, and thereby the need to conduct auctions, in its licensing proceedings.[8/] Nothing in the Communications Act allows the Commission to issue licenses based on negotiations among private parties to avoid mutual exclusivity for initial applications.[9/]

Congress Acted to Prevent Exactly What the CBA Proposes

Legislative history does not support the CBA's contention that the Commission is obligated to consider private negotiations under Section 309(j)(6)(E).[10/] The CBA's recitation of legislative history stops in 1997. As the Public Interest Spectrum Coalition has pointed out, subsequent history makes clear that Congress did not intend for any private negotiations to result in the type of windfall that the CBA would receive through its proposal.[11/] Indeed, Congress specifically enacted legislation to prevent such behavior.

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that "[m]id-band spectrum is critically important for 5G deployment" and urging the Commission to "repurpose as much 3.7-4.2 GHz spectrum as possible as quickly as possible for use in 5G networks"); Comments of United States Cellular Corp., GN Docket No. 18-122, at 3 (filed Oct. 29, 2018) ("Given the significant importance of the 3.7-4.2 GHz band to next generation wireless services and the wireless industry generally, USCC urges the Commission to utilize an incentive auction-based reallocation mechanism for this spectrum in order to maximize the amount spectrum repurposed for mobile broadband services and to ensure that all interested parties have an opportunity to compete for, and acquire, new flexible use licenses for this spectrum.").

7/ *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, 27 FCC Rcd 12357, ¶ 291 (2012) ("Where only one party seeks a particular license offered in competitive bidding, that license will be removed from the competitive bidding process and the Commission will consider that party's non-mutually exclusive application for the license through a process separate from the competitive bidding."); *see also* 47 C.F.R. § 1.2102(a).

8/ *See* CBA Letter at 4.

9/ *See id.* at 4-5.

10/ *See id.* at 3.

11/ *See* Comments of the Public Interest Spectrum Coalition, GN Docket No. 18-122, at 28-30 (filed Oct. 29, 2018).

As the CBA recognizes, Congress expanded the FCC's auction authority in 1997 and set the stage for the 700 MHz auction by requiring broadcasters to be repacked as part of the digital television ("DTV") transition.[12/] When it became apparent that the plan adopted by the FCC could result in a windfall to broadcasters, Congress acted specifically to reverse that plan by passing the Auction Reform Act of 2002.[13/] That statute required the FCC to delay its then-scheduled 700 MHz auction, reverse its initial plan, and ensure that the auction "did not result in the unjust enrichment of any incumbent licensee."[14/] The Auction Reform Act passed largely as a result of the recognition by some senators that allowing the broadcasters to negotiate private deals in advance of an auction that governs the transfer of spectrum and allow them to earn profits would be "outrageous."[15/] In 2008, the Commission auctioned the band in an open and transparent manner, raising over $19 billion.[16/]

The parallels between what the Commission would have sanctioned in 2001 – which was specifically rejected by Congress – and what CBA proposes today are uncanny. Then, the Commission stated that it would not stand in the way of private agreements between broadcasters and potential wireless providers that would facilitate the transition of spectrum, in exchange for broadcasters receiving a percentage of the auction proceeds from ultimate auction winners.[17/] Among the other reasons for the Commission's proposal was the alleged speed by which the spectrum would be made available for 3G operations.[18/] Some broadcasters gloated over the "windfall" they would receive from this process, prompting Congress to act.[19/]

12/ *See* Balanced Budget Act of 1997, Pub. L. No. 15-33, 111 Stat. 251.

13/ *See* Auction Reform Act of 2002, Pub. L. No. 107-195, 116 Stat. 715.

14/ *Id*.

15/ *See* David Enrich, *Hollings Criticizes FCC Spectrum Plan*, MULTICHANNEL (Oct. 19, 2001), https://www.multichannel.com/news/hollings-criticizes-fcc-spectrum-plan-379161; Statement from Sen. McCain, 148 Cong Rec. 2220 (Mar. 21, 2002).

16/ *See Auction of 700 MHz Band Licenses Scheduled for January 24, 2008; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 73 and 76*, Public Notice, 22 FCC Rcd 18141 (2007); *Auction of 700 MHz Band Licenses Closes*, Public Notice, 23 FCC Rcd 4572, ¶ 1 (2008).

17/ *See Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Report and Order, 15 FCC Rcd 476 (2000); *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, et al.*, Memorandum Opinion and Order, 15 FCC Rcd 20845 (2000); *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, et al.*, Third Report and Order, 16 FCC Rcd 2703 (2001).

18/ *See* Norman Ornstein and Michael Calabrese, *Hey Give Back Those Airwaves – Or Pay Up*, WASHINGTON POST (Oct. 14, 2001), https://www.washingtonpost.com/archive/opinions/2001/10/14/hey-give-back-those-airwaves-or-pay-up/f80d86d7-2103-4a51-8f39-8a65dd78a7cc/?utm_term=.d3f8a213df7a.

19/ *See, e.g.*, *id.*; Bill McConnell, *Paxson Eyes $46B Mark*, BROADCASTING AND CABLE (Sept. 3, 2000), https://www.broadcastingcable.com/news/paxson-eyes-46b-mark-77696.

The CBA now wants the Commission to proceed down the same path that Congress already rejected. Alleging that its process would put spectrum to use for 5G operations more quickly,[20/] and similar to the broadcasters in the 700 MHz proceeding, the CBA proposal would allow the CBA to engage in private negotiations in advance of licensing C-band spectrum. Congress' direction is clear: incumbent licensees cannot manipulate the process of re-purposing spectrum, even based on claims that doing so will result in quicker spectrum use. Indeed, any question that the Auction Reform Act was intended to prevent the Commission from implementing the CBA's proposal was erased when Congress directed the Commission to conduct incentive auctions under Section 309(j)(8)(G). Section 309(j)(8)(G) demonstrates Congress' clear intent that the FCC must conduct an incentive auction when incumbent licensees voluntarily relinquish spectrum that is being converted for other uses.

The proposed 700 MHz negotiations and the CBA's proposed negotiations are different from the types of *post-auction* clearing negotiations in which 600 MHz licensees have been engaged as a part of the Broadcast Incentive Auction. For example, and as the Commission is aware, T-Mobile has made a voluntary commitment to compensate certain low-power television stations that are unable to obtain a permanent channel in time to accommodate T-Mobile's rapid deployment of broadband service in the 600 MHz to move to a temporary channel before moving to a permanent channel.[21/] These negotiations occurred *after* the Commission's incentive auction already determined the winning bidders and ensured a fair dissemination of the licenses. Moreover, the payments are directly related to the licenses T-Mobile has received. They are not, like the arrangements in the 700 MHz proceeding and the arrangements contemplated in the CBA's proposal, payments that would generally encourage the incumbents to relinquish spectrum that prospective licensees may or may not receive.

The Single Case the CBA Cites Does Not Support its Assertion

The CBA cites *Damsky v. FCC* in support of its argument that negotiations among private parties are permitted under Section 309(j)(6)(E) of the Act as a means of avoiding mutual exclusivity.[22/] But the *Damsky* case is not instructive on this point.

First, the *Damsky* case was decided when the Commission resolved mutually exclusive applications through comparative hearings (or "beauty contests") that assessed applicants' basic

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20/ *See* CBA Letter at 10 (claiming that the CBA's proposal "will bring valuable spectrum to market years ahead of any alternative proposal").

21/ *See* Letter from Steve B. Sharkey, Vice President, Government Affairs, T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-306, *et al.*, at 1 (filed Aug. 4, 2017) (noting that "T-Mobile is willing to go beyond what is required and compensate these stations for the additional move"); Letter from Steve B. Sharkey, Vice President, Government Affairs, T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-306, *et al.* (filed July 17, 2017).

22/ *See* CBA Letter at 4-5; *Damsky v. FCC*, 199 F.3d 527 (D.C. Cir. 2000).

and comparative qualifications. In the FCC proceeding leading up to that case, Heidi Damsky and two other applicants, WEDA, Ltd. ("WEDA") and Homewood Partners, Inc. ("HPI"), filed mutually exclusive applications for a permit to construct a new FM broadcast station.[23/] Through the comparative hearing process, an Administrative Law Judge found that Damsky failed to establish her financial qualifications, dismissed her application, and concluded that HPI's application should be granted.[24/] Subsequently, HPI and WEDA entered into a settlement agreement, under the terms of which they would merge to form a new entity, contingent upon Damsky's disqualification.[25/] The Commission approved the settlement agreement and granted the permit to the resulting entity.[26/]

Damsky filed a petition for reconsideration of the Commission's decision, and during the pendency of that proceeding, the Commission released an Order adopting rules to implement its then-new authority under Section 309(l) of the Act to conduct auctions for mutually exclusive applications for construction permits that were filed before July 1, 1997.[27/] In response to that Order, Damsky urged the FCC to declare that the winner of the proceeding would be selected by competitive bidding and find that Damsky would be qualified to participate.[28/] However, the Commission rejected her claim because Section 309(l) of the Act also required the Commission, for a 180-day period, to "waive any provisions of its regulations necessary" to permit applicants

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23/ *See Applications of Heidi Damsky; WEDA, Ltd.; Homewood Partners, Inc., for Construction Permit for a New FM Station on Channel 247A in Homewood, Alabama*, Initial Decision Of Administrative Law Judge Joseph Chachkin, 7 FCC Rcd 5244, ¶ 1 (1992) (explaining that 13 applicants were designated for comparative hearing, but the applicant pool had narrowed to include Damsky and the two others by the time the hearing was conducted).

24/ *See Applications of Heidi Damsky; WEDA, Ltd.; Homewood Partners, Inc., for Construction Permit for a New FM Station on Channel 247A in Homewood, Alabama*, Memorandum Opinion and Order, 13 FCC Rcd 11688, ¶ 2 (1998) ("*1998 Damsky Order*").

25/ *See id.* ¶¶ 4, 5.

26/ *See id.* ¶ 7.

27/ *See* 47 U.S.C. § 309(l) (permitting, but not requiring, the FCC to conduct auctions for mutually exclusive applications received before July 1, 1997); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses et al.*, First Report and Order, 13 FCC Rcd 15920 (1998) ("*1998 Auction Order*"). At that time, Section 309(j) of the Act, in contrast to Section 309(l), *required* the Commission to grant construction permits through an auction for applications *after* July 1, 1997. *See Damsky*, 199 F.3d at 531.

28/ *See Applications of Heidi Damsky; WEDA, Ltd.; Homewood Partners, Inc., for Construction Permit for a New FM Station on Channel 247A in Homewood, Alabama*, Order, 14 FCC Rcd 370, ¶ 9 (1999) ("*1999 Damsky Order*") (arguing that the new rules prohibited entities from participating in an auction only when denial of an application was final and that denial of her application was not final because the original order disqualifying her was still under review); *1998 Auction Order* ¶ 89 ("At the outset we clarify that, where the Commission has denied or dismissed an application and such denial or dismissal has become final (e.g., when an applicant failed to seek further administrative or judicial review of that ruling), such an entity is not entitled to participate in the auction.").

to enter into settlement agreements to remove voluntarily the conflict between their applications, and the settlement agreement between HPI and WEDA fell within that 180-day window.[29/]

On appeal, the D.C. Circuit did not, as the CBA suggests, affirm the Commission's decision to grant a construction permit pursuant to a private negotiation in lieu of holding an auction. Rather, the D.C. Circuit simply agreed with the Commission that, in resolving the ambiguity surrounding the Section 309(l) auction and settlement provisions, the Commission was within its right to uphold the decision made through the comparative hearing process that the entity merged pursuant to a settlement agreement was the entity that was qualified to receive the construction permit and, consequently, that Damsky was not entitled to an auction.[30/] In other words, it upheld the Commission's decision to continue to use a comparative hearing process, which involved the use of a settlement agreement, to resolve mutually exclusive applications instead of exercising its then-new authority to use auctions to resolve mutually exclusive applications.

Second, the Commission has specifically acknowledged that the *Damsky* case is not applicable outside of comparative hearings. Indeed, in 2001, the Commission explained that the *Damsky* case involves issues "that would be rendered moot under auction procedures,"[31/] explaining that "the court affirmed [the FCC's] adjudication of the financial issue against a non-settling applicant in the context of a settlement agreement filed *before* the implementation of auction procedures."[32/]

Finally, whatever authority the Commission may have to allow parties to engage in negotiation to avoid mutual exclusivity may only be exercised *after* the Commission accepts applications, not, as the CBA would permit, before applications are even submitted. That was certainly the case in *Damsky* and remains true today. For example, the Wireless Telecommunications Bureau recently adopted procedures to permit the relicensing of 700 MHz spectrum recaptured for licensees' failure to meet performance requirements.[33/] That Public Notice contemplates that *after* the acceptance of applications, parties will be permitted to negotiate to resolve mutual exclusivity.[34/] Neither the Wireless Telecommunications Bureau acting on delegated authority

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29/ *See 1999 Damsky Order* ¶ 11 (finding that the *1998 Damsky Order* approving the settlement obviated the need for an auction).

30/ *See Damsky*, 199 F.3d at 535 ("Considering the ambiguity surrounding the interaction between the § 309(l) auction and settlement provisions as described by the Commission in the Auction Order, we conclude that the Commission adequately explained why it did not regard paragraph 89 of the Auction Order as requiring that Damsky be allowed to participate in an auction for the construction permit.").

31/ *Applications of Liberty Productions, a Limited Partnership et al.*, Memorandum Opinion and Order, 16 FCC Rcd 12061, ¶ 53 (2001).

32/ *Id.* ¶ 53 (*emphasis added*).

33/ *See Wireless Telecommunications Bureau Announces Process for Relicensing 700 MHz Spectrum in Unserved Areas*, Public Notice, WT Docket No. 06-150, DA 19-77 (rel. Feb. 12, 2019).

34/ *See id.* ¶¶ 53-55.

nor the Commission itself has ever sanctioned negotiations *before* applications were even accepted.

Section 309(j)(6)(E) Also Includes a Public Interest Determination

Any relevance that Section 309(j)(6)(E) may have to the private negotiations contemplated by the CBA must be viewed against the backdrop of the Act's requirement that the use of an alternative mechanism must be in the public interest.[35/] As T-Mobile has explained, the CBA's proposal is clearly not.[36/] The CBA's proposal not only involves closed-door transactions that would allow the CBA to have sole control of the relicensing process, but it also does not make the maximum amount of spectrum available for terrestrial wireless services because it only guarantees that 180 megahertz of spectrum will be repurposed.[37/] In addition, the CBA's approach fails to recognize that satellite operators or earth station registrants may be willing to relinquish more spectrum in some areas than in others. Any claims of superior speed of the CBA's proposal are unfounded and would come at the expense of an inferior amount of spectrum and deep legal flaws. More importantly, the CBA's proposal does not account for the interests of all relevant stakeholders – particularly U.S. taxpayers. Nor, unlike a C-band incentive auction, does its proposal do anything to support fiber deployment. Thus, even if the Act allows private negotiations as an alternative mechanism as the CBA suggests, its use in this case would not be consistent with the public interest.

The Auction Process Provides More Applicant Review than the CBA Would Permit

In response to arguments by Comcast and NBCUniversal, the CBA asserts that its approach does not involve an impermissible sub-delegation of the Commission's licensing authority under Section 309(j)(6)(E) because final authority to approve or deny a C-band license would remain with the Commission.[38/] However, the CBA ignores that the licensing process in the context of inviting mutually exclusive applications is not limited to the FCC simply reviewing long-form applications.

35/ 47 U.S.C. § 309(j)(6)(E); *see* Reply Comments of T-Mobile USA, Inc., GN Docket No. 18-122, *et al.*, at 26-27 (filed Dec. 11, 2018) ("T-Mobile Reply Comments").

36/ *See* T-Mobile Reply Comments at 20-37; Comments of T-Mobile USA, Inc., GN Docket No. 18-122, *et al.*, at 10-13 (filed Oct. 29, 2018) ("T-Mobile Comments").

37/ *See* Letter from Steve B. Sharkey, Vice President, Government Affairs, Technology and Engineering Policy, T-Mobile, to Ms. Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Feb. 15, 2019).

38/ *See* CBA Letter at 5-6 (adding that sub-delegation is only impermissible if it is not authorized by statute and that, if the CBA's approach were found to sub-delegate authority to the CBA, that sub-delegation would be authorized by Section 309(j)(6)(E)'s direction to explore negotiation where consistent with the public interest). As noted above, however, such negotiations are not intended to extend to private parties, and, even if they were, the CBA's proposal would not be consistent with the public interest.

Under the CBA's proposal, the CBA would assume the FCC's vital role in collecting and reviewing initial short-form applications, if it chose to do so at all. This appropriation of the FCC's duties would allow the CBA to eliminate the safeguards that the Commission has put in place to ensure there is robust competition and a non-discriminatory dissemination of licenses. And it would allow the CBA to determine which entities, if any, would be provided with support through, for instance, bidding credits to have a fair chance at obtaining licenses. Even if the Commission has the ultimate say, the CBA's proposal provides no transparency into its selection process and runs the risk that a buyer who would have been allowed to participate by the Commission was never allowed to engage in negotiations with the CBA – taking away an important decision that should be made by the Commission and skewing results. Having the Commission rubber-stamp licensees that are hand-picked by the CBA pursuant to private transactions circumvents a key part of the licensing process and should not be permitted.

Section 309(j)(3) The CBA argues that Section 309(j)(3) of the Act, which requires the Commission to protect the public interest when assigning licenses, does not prohibit its approach because that section applies only where the Commission issues licenses by competitive bidding and because its approach ultimately advances the public interest.[39/] The CBA's argument that Section 309(j)(3) does not apply to the C-band is only right if the Commission is allowed to avoid auctions under Section 309(j)(6)(E). As noted above, it is plainly not.

The CBA also conflates T-Mobile's argument that wireless carriers should remain free to negotiate different arrangements *post-auction* with the argument that *pre-auction* private spectrum negotiations are not likely to result in optimal outcomes.[40/] Private transactions pre-auction and private transactions post-auction are very different. As demonstrated above with respect to the DTV transition, pre-auction private transactions would have allowed broadcasters to receive a windfall. Post-auction private transactions, however, occur after the Commission has conducted an auction that, among other things, ensures that applicants are fully vetted, the licenses go to the parties that value them the most, and, more importantly, any financial benefit has already gone to U.S. taxpayers. And there are regulations in place to ensure that post-auction transactions continue to serve the public interest. For example, the Commission has implemented restrictions on post-auction transactions for licenses obtained with bidding credits.[41/]

Section 309(j)(8)(G) The CBA contends that, like Section 309(j)(3) of the Act, Section 309(j)(8)(G), which permits the Commission to use incentive auctions, applies only where the

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39/ *See* CBA Letter at 6-8.

40/ *See id.* at 8-9.

41/ *See* 47 C.F.R. § 1.2111.

Commission issues licenses by auction.[42/] T-Mobile agrees and has demonstrated that an auction is required in this context.[43/]

While Congress did not mandate that the Commission conduct incentive auctions, the circumstances in this case – licensees relinquishing spectrum rights to permit the spectrum to be used for a new service – is exactly what is covered by Section 309(j)(8)(G). The provision indicates Congressional intent that any incentive auction should be conducted by the Commission and not privately. Indeed, this is evidenced by the Commission's recent decision to conduct an incentive auction for the Upper 37 GHz, 39 GHz, and 47 GHz bands when it could have permitted incumbents in those bands to engage in the same type of private sale that CBA now proposes.[44/]

Sections 303(c) and 307(b) The CBA's assertion that its proposal would not usurp the FCC's role under Section 303(c) to assign frequencies and under Section 307(b) to distribute frequencies on a non-discriminatory basis is illogical.[45/] The CBA reads both sections too narrowly.

The Commission's obligations under those provisions are not limited to rubber-stamping applications submitted by entities selected to be licensees by private parties. The FCC cannot assign the licenses in a non-discriminatory manner when it has no say in who should be allowed to apply for the licenses in the first place. As explained above, while the FCC may have the final say in who gets the licenses, it would never, under the CBA's proposal, know the parties that were initially interested in the licenses. Only after secret transactions where the CBA gets to pick and choose the ultimate winners will the FCC be aware of the identities of the potential licensees. Without knowing the full pool of potential applicants, the FCC is necessarily prohibited from ensuring that licenses are disseminated in a non-discriminatory manner as required by the Act.

Attempts by the CBA to Discredit T-Mobile are Misguided and Misinformed

The CBA attempts to contradict the recent arguments made by T-Mobile in its January 30 *ex parte* and repeats its misrepresentation that the Commission has "a long-track record of expanding rights and approving transactions to maximize spectrum use."[46/] As T-Mobile has

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42/ *See* CBA Letter at 8-9.

43/ *See* T-Mobile Reply Comment at 3-13; T-Mobile Comment at 13-15.

44/ *See Use of Spectrum Bands Above 24 GHz For Mobile Radio Services*, Fourth Report and Order, GN Docket No. 14-177, FCC 18-180, ¶¶ 7-10 (rel. Dec. 12, 2018).

45/ *See* CBA Letter at 9-10.

46/ *Id.* at 10.

explained,[47/] however, the precedent the CBA cites demonstrates that in cases where the FCC has expanded rights, it has done so with the expectation that the spectrum at issue could be used *by the incumbent licensees* to deploy new or additional services, not to allow the incumbents to immediately sell those rights. While the CBA claims that its proposal seeks a "narrower expansion of its members' rights in order to convey clearing rights through secondary market transactions,"[48/] that statement is a farce as those "secondary market transactions" would involve selling the precise expanded rights that the CBA seeks.

The CBA further asserts that T-Mobile's argument that the sales of the 28 GHz and 39 GHz licenses were not in the public interest "proves too much" because any sale that involves the transfer of spectrum licenses prevents others from accessing the spectrum, including the spectrum that T-Mobile seeks from Sprint.[49/] The CBA once again confuses transactions involving spectrum for which expanded rights were created as part of the transaction and those that are simply secondary market transactions. Unlike the 28 GHz and 39 GHz licenses, the spectrum that T-Mobile seeks from Sprint is not spectrum in which Sprint was recently granted expanded mobile rights. T-Mobile is proposing to purchase rights that Sprint has long had as part of a larger business transaction. While the FCC is considering expanded use of spectrum held by Sprint in the 2.5 GHz band,[50/] that issue is a part of an unrelated proceeding that was initiated before Sprint and T-Mobile submitted applications seeking Commission consent to the transfer of control of the licenses, authorizations, and spectrum leases held by Sprint to T-Mobile.[51/]

Finally, the CBA is being willfully ignorant if it thinks that build out has no relationship to government-run auctions. An auction ensures that spectrum goes to the party that values it the most. Under the CBA's proposal, however, there can be no assurance that the ultimate licensee will be the entity that values it most highly. The secret deals that the CBA can cut may be based on a variety of strategic, non-transparent factors that are unrelated to whether the licensee values the licenses sufficiently to build them out.

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47/ *See* Letter from Steve B. Sharkey, Vice President, Government Affairs, Technology and Engineering Policy, T-Mobile, to Ms. Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Jan. 30, 2019).

48/ CBA Letter at 11.

49/ *See id.* at 12.

50/ *See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands et al.*, Notice of Proposed Rulemaking, 33 FCC Rcd 4687 (2018).

51/ *See Commission Opens Docket for Proposed Transfer of Control of Sprint Corporation to T-Mobile US, Inc.*, Public Notice, 33 FCC Rcd 604 (2018).

Pursuant to Section 1.1206(b)(2) of the Commission's rules, an electronic copy of this letter is being filed in the above-referenced docket. Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,

/s/ Russell H. Fox

Russell H. Fox

Counsel to T-Mobile, USA, Inc.